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No. 80-2165

In The

Supreme Court of the United States

October Term, 1980

JAMES M. MURPHY,

District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

vs.

EUGENE L. HUNT,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM OR DISMISS

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QUESTIONS PRESENTED

1. Whether the Excessive Bail Clause of the Eighth Amendment to the Constitution of the United States is applicable to the states through the Due Process Clause of the Fourteenth Amendment.

2. Whether the Excessive Bail Clause of the Eighth Amendment creates a constitutional right to bail, and if so, to what extent.

3. Whether the 1978 amendment to the Bail Clause (Article I, Section 9) of the Constitution of Nebraska which denies bail to persons, including appellee, charged with "sexual offenses involving penetration by force or against the will of the victim" violates the Excessive Bail Clause of the Eighth Amendment to the Constitution of the United States.

4. Whether the 1978 amendment to the Bail Clause of the Constitution of Nebraska violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

5. Whether the 1978 amendment to the Bail Clause of the Constitution of Nebraska violates the presumption of innocence protected by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

6. Whether the 1978 amendment to the Bail Clause of the Constitution of Nebraska violates the rights to the effective assistance of counsel and freedom to prepare a defense protected by the Sixth Amendment to the Constitution of the United States.

7. Whether the 1978 amendment to the Bail Clause of the Constitution of Nebraska violates the prohibition against cruel and unusual punishment of the Eighth Amendment to the Constitution of the United States.

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Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee Eugene L. Hunt moves that the judgment below of the United States Court of Appeals for the Eighth Circuit be affirmed, or this appeal be dismissed, because the issues raised herein are too unsubstantial to warrant plenary review, there is no apparent

conflict between the decision below and decisions of the other Federal Circuit Courts of Appeals, and the decision below is correct and consistent with decisions of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, United States Constitution

. . . ; nor shall any States deprive any person of liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII, United States Constitution

Excessive bail shall not be required . . . , nor cruel and unusual punishments inflicted.

Amendment VI, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Appellee generally accepts the Statement of the Case contained in appellant's Jurisdictional Statement, but would add that because the decision below of the Court of Appeals dismissed appellee's habeas corpus appeal as moot, and appellee has not nor does he intend to petition for certiorari from that ruling, the only case which is now

properly before this Court is the appeal by appellant Murphy in appellee's No. 1983 civil rights case. For this reason, the inclusion of the habeas corpus case in the caption of appellant's Jurisdictional Statement is incorrect, and appellee has therefore modified the caption on this Motion to Affirm or Dismiss to correct this error and otherwise conform the caption to the facts of this case and applicable Supreme Court Rules.

ARGUMENT

A. The issues raised by this case are too unsubstantial to warrant plenary review because the Nebraska Law declared unconstitutional by the Court of Appeals is nearly unique and a decision by this Court will therefore have minimal national impact.

While appellee concedes that the constitutional issues raised by this appeal are certainly novel, interesting, and important to the extent that they have never been clearly resolved by this Court and concern the liberty of a number of actual and potential criminal defendants in Nebraska, the fact remains that the Nebraska law struck down by the Court of Appeals has not to the knowledge of counsel been adopted by any other jurisdiction in the United States. For this reason, the impact of this Court's decision in this appeal will be limited to the State of Nebraska and those relatively few Nebraska defendants charged with the sexual offenses affected by the invalidated state constitutional amendment.

Although a few other jurisdictions have adopted constitutional provisions or statutes restricting bail for certain classes of multiple offenders or dangerous defendants, none of these except perhaps a recent Michigan constitutional amendment bear any similarity to the Nebraska law which is the subject of this appeal. See D. C. Code Ann. Sec. 23-1322; Ariz. Const. Art. II, Sec. 22; Tex. Const. Art. V, Sec. 11 (a); Utah Const. Art. I, Sec. 8; and Mich. Const. Art. I, Sec. 15. Most other American jurisdictions follow the traditional pattern originating with the 1787 Ordinance to Govern the Northwest Territory and the federal Judiciary Act of 1789 of mandating a right to bail in all but capital cases. See *Petition of Humphrey*, 601 P. 2d 103, 108-111 (Okla. Crim. 1979) (Compiling state constitutional provisions).

This Court has already denied certiorari when presented with precisely the same substantive issues raised by this appeal. *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106; cert. denied, Brennan, Marshall, and Blackmun JJ. dissenting, 44 U. S. 920 (1979). Such denial possibly reflects the historic reluctance of this Court to expend its limited and valuable time on problems which, though intrinsically important, are nevertheless relatively "academic or episodic". *Rice v. Sioux City Cemetery*, 349 U. S. 70, 74 (1955).

The Court has recognized that in order to be considered sufficiently important to justify granting certiorari or full briefing and oral argument on appeal, a constitutional issue must be important "to the public as distinguished from" merely the particular "parties" involved in the litigation. *Rice v. Sioux City Cemetery*, supra; *Layne & Bowler Corp. v. Western Well Works*, 261 U. S. 387, 393

(1923). For example, in *New York v. O'Neill*, 359 U. S. 1, 3 (1959) the Court granted certiorari to review a state court ruling declaring a state statute invalid under the federal Constitution "inasmuch as this holding brings into question the constitutionality of a statute now in force in forty-two States and the Commonwealth of Puerto Rico". And in *McGee v. International Life Ins. Co.*, 355 U. S. 220, 221 (1957) certiorari was granted to hear constitutional questions involving a California statute where such issues were determined by the Court to be important "not only to California but to other States which have similar laws".

Unlike the foregoing situations, most of the issues in this case affect only a narrow class of criminal defendants charged in Nebraska state courts. A survey of the number of cases affected determined that in the first year after enactment of the 1978 bail amendment, 32 defendants charged with sexual offenses in Nebraska had been denied bail. See *Hunt v. Murphy*, — F. 2d —, No. 80-2068 (8th Cir. 1981) fn. 27 contained at p. App. 33 of appellant's Jurisdictional Statement.

While it could be argued that a decision on two of the issues raised by this appeal (whether the Excessive Bail Clause of the Eighth Amendment is applicable to the states, and whether that clause creates a constitutional right to bail) would have general application throughout the United States, these issues alone are fairly abstract and a decision concerning them would be of little guidance to lawyers and judges attempting to resolve specific constitutional problems arising in the future with regard to bail.

Because the issues raised by this appeal are not sufficiently important or substantial to justify briefing and

oral argument, the judgment below of the Court of Appeals should be affirmed, or this appeal dismissed.

B. There is no apparent conflict between the decision below and decisions of other Federal Circuit Courts of Appeals.

Apart from the obvious conflict between the decision below of the Court of Appeals and the Supreme Court of Nebraska on precisely the same issues in *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106; cert. denied, Brennan, Marshall and Blackmun JJ. dissenting, 444 U. S. 920 (1979), there appears to be no apparent conflict between the federal Circuit Courts of Appeals on these issues. The United States Court of Appeals for the Third Circuit has just recently determined the Eighth Amendment Bail Clause to be applicable to the states through the Fourteenth Amendment. *Sistrunk v. Lyons*, — F. 2d —, 49 L. W. 2719, 29 Cr. L. Rptr. 1025 and 2129 (3rd Cir. 1981). To counsel's knowledge, all other federal Circuit Courts considering the question have done likewise. *United States ex rel. Goodman v. Kehl*, 456 F. 2d 863 at 868 (2nd Cir. 1972); *Simon v. Woodson*, 454 F. 2d 161 at 164-165 (5th Cir. 1972).

So far as concerns the other issues raised by this appeal, i. e., whether the Eighth Amendment Bail Clause creates a constitutional right to bail, and whether bail legislation similar to Nebraska's 1978 amendment violates that and other provisions of the federal Constitution, there appears to have been little, if any, litigation and therefore no apparent conflicts between the decision below and those of the other federal Circuit Courts of Appeals.

Because there is no apparent conflict between the decision below and decisions of the other federal Circuit Courts of Appeal the judgment of the Court of Appeals should be affirmed, or this appeal dismissed.

C. The decision below of the Court of Appeals is correct and consistent with decisions of this Court.

A further reason for affirming the judgment below of the Court of Appeals is that it appears correct and consistent with what little law has been decided on the subject by this Court. While the Court has never expressly held the Eighth Amendment Bail Clause applicable to the States, one of its recent opinions did state "bail . . . is basic to our system of law". *Schilb v. Kuebel,* 404 U. S. 357, 365 (1971). *Duncan v. Louisiana,* 391 U. S. 145, 149-150 (1968) indicated that the Fourteenth Amendment protects against state action rights which are "fundamental to the American scheme of justice; . . . whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty". The foregoing description of bail in *Schilb v. Kuebel,* supra, suggests that under the test of *Duncan v. Louisiana,* supra, bail is a right applicable to the states through the Fourteenth Amendment.

Although its holding was limited to finding that the challenged 1978 Nebraska bail amendment violated the Eighth Amendment Bail Clause as applicable to the States through the Fourteenth Amendment, the decision below of the Court of Appeals noted the importance of bail in protecting the presumption of innocence guaranteed by the Due Process Clause of the Fourteenth Amendment, the right to the effective assistance of counsel protected by

the Sixth Amendment, and, in fact, "the entire structure of the constitutional rights enumerated in the Bill of Rights". *Hunt v. Murphy*, — F. 2d —, No. 80-2068 (8th Cir. 1981) at p. App. 32 and p. 12 of appellant's Jurisdictional Statement.

Following is strong dictum from this Court's leading bail decision, *Stack v. Boyle*, 342 U. S. 1 (1951), supporting the Court of Appeals decision below and the contentions raised by appellee in this appeal and below that the denial of bail to him in this case violated several provisions of the federal Bill of Rights beyond the Eighth Amendment Bail Clause:

> "This traditional right to freedom before conviction (bail) permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. (citation omitted). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning". 342 U. S. 1, 4.

For examples of other decisions of this Court, or Circuit Justices thereof, supporting the foregoing principles enunciated in *Stack v. Boyle*, supra, and followed in the decision below, see *United States v. Motlow*, 10 F. 2d 657, 659 (7th Cir. 1926); *Sellers v. United States*, 89 S. Ct. 36, 38 (1968); *Bitter v. United States*, 389 U. S. 15, 16-17 (1967); *Herzog v. United States*, 75 S. Ct. 349 (1955).

While the Court of Appeals decision below did not deal with appellee's contention that the challenged Nebraska bail amendment also breached the Equal Protection Clause of the Fourteenth Amendment, it is clear from decisions of this Court that once bail is determined to be a "fundamental" constitutional right, as suggested by the

foregoing authorities, the Nebraska law could in all likelihood not withstand the "strict scrutiny" and "compelling governmental interest" tests to be applied to it under those decisions. *Massachusetts Bd. of Retirement v. Murgia,* 427 U. S. 307 (1976); *Shapiro v. Thompson,* 394 U. S. 618 (1969).

Because the Court of Appeals decision below appears to be correct and consistent with this Court's own decisions, it should be affirmed.

CONCLUSION

For the reasons stated, appellee urges the Court to either affirm the decision below, or dismiss this appeal.

Respectfully submitted,

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